

TOWN OF CUSHING
PLANNING BOARD
Minutes of Meeting
January 18, 2006

Board Present: Bob Ellis, Evelyn Kalloch, Dan Remian, Mike Roberts, Town Attorney
Greg Cunningham, CEO Bickford and Secretary Pro Tem Crystal Robinson

Board Absent: Arthur Kiskila

Call to Order: Chairman Roberts called the meeting to order at 6:10 pm and stated that this was a continuation of the January 4 meeting.

1. Special meeting to consider Meduncook Plantation Amendment, postponed from the January 4th regular meeting; James Tower to present application and changes to same: Mr. Tower posted a drawing providing an overview of the proposed changes in this amendment to the Meduncook Plantation Subdivision. He stated that the amendment included four items: 1) extend the road, 2) increase the size of Lot #10 by the amount of land between it and the road, 3) add Lot #26 and 4) increase the size of the common area. Mr. Tower wanted to add 4.75 acres to the common area in the area of the cove behind what he called the "hammerhead peninsula". He felt adding this to the common area would end any question of whether the area would ever be developed, though there would be a couple of hiking trails. In response to a question from Mr. Ellis, Mr. Tower admitted he had not depicted the common area lines clearly and pointed them out on the plan. He said the drawing showed its original 3.75 acres, but a recent easement from the West Knoll Wildlife Conservation Trust [WKWCT] would expand it.

Mr. Tower stated he was adding one lot as an extension and expansion of Meduncook Bay Colony. Mr. Roberts asked if the addition of Lot #26 would affect any of Mr. Tower's previous dealings with the Accord Group. Mr. Tower replied that it would not, as the agreement with them terminated at the property boundary. Even with the addition of Lot #26, Mr. Tower said he had not exceeded the number of lots in that agreement. Mr. Roberts clarified that there would be no place to further expand if this amendment were approved.

Kim Young stated that he did not agree with the property line, depicted on the plan, between his property and that of WKWCT. Mr. Tower said a registered land surveyor had established the lines. Mr. Young said he had discussed this with Mr. Tower, who had promised to provide him with documentation. Mr. Tower said that information was still forthcoming. Mr. Young said his surveyor had a different opinion of where the line was. Mr. Tower said the line in question was outside the consideration of the subdivision. The Board spent some time discussing particular lines on the plan and ascertained that some of the color-coding was incorrect. Mr. Tower said the recording Mylar would not show Mr. Young's line. Mr. Tower, upon further questioning, said he had a handshake agreement with WKWCT to purchase the property at the tip of the hammerhead. CEO Bickford asked if there would be a further set of plans to be discussed at a later meeting. Mr. Tower said he had not brought Mylars to be signed because he was waiting for the DEP permit. He was seeking conditional approval this evening.

Mr. Ellis asked that the Board address questions from the last meeting that had since been researched by Town Attorney Cunningham. First, Mr. Ellis stated that the Dept. of Fisheries and Wildlife had suggested appropriate buffers, which he felt needed to be defined. Mr. Tower said that was part of the information being presented to DEP. He had hired a wildlife biologist, who had visited the site and done a study that concluded the wading bird habitat did not meet the criteria for moderate or high value wild fowl habitat. Mr. Ellis said that conclusion was in conflict with the state's map. Mr. Tower agreed, saying that was not uncommon because the state maps were painted with a wide brush. Mr. Tower's biologist had made a visit at full high tide, the appropriateness of which Mr. Tower questioned. Mr. Tower reported that the Maine Historic Preservation Commission had contacted him with concerns that Native Americans might have camped on the property. Subsequently, archaeologist Dr. Cox had visited the site, made four test pits, and reported no evidence of activity by indigenous peoples. A letter from Dr. Cox would be going to the DEP, also, with a copy to CEO Bickford.

Mrs. Kalloch noted that the covenants needed to be discussed and were supposed to be on the plans. Mr. Tower said he had provided the location of the covenants to Mr. Cunningham. Mr. Cunningham said, based on the Declaration of Covenants as provided in the application, he had concerns about Cushing Holdings LLC's ability to

extend the road and add lots to the subdivision. Now that lots had been sold, he said, the lot owners might have rights that superseded those of Mr. Tower. Mr. Cunningham said the Board had asked him to research the interplay between the covenants and the application and he had found, on Page 8 of the covenants, Paragraph 22, which said no subdivision lot could be subdivided and there shall be no more than twenty-one lots in the subdivision. Additionally, on Page 26, there was a provision that said the covenants could not be amended without the consent of all lot owners and approval by the PB. At the last meeting, Mr. Tower had presented a letter from his attorney that had led to the discovery that covenants provided with the application had since been changed. Mr. Tower agreed that the Board did not have the correct covenants document. Mr. Cunningham instructed the Board that it was always important to insist such documents be registry-stamped.

Mr. Cunningham had located the current covenants and learned that Paragraph 22 had been amended to say only that no lot could be subdivided. As a result, Mr. Cunningham concluded that lot owners would not have the ability to restrict the addition of lots. Mr. Roberts asked if this was the version of the covenants that the PB had approved. Mr. Cunningham said Mr. Tower had included the same Declaration of Covenants document in each of his subdivision applications, perhaps as a sample. Chairman Roberts suggested it would be necessary to see what the lot owners had for covenants in their records in order to determine which set was accurate. Mr. Tower said the recorded Declaration of Covenants was part of every deed. He further stated that the covenants had been amended prior to recording precisely because the PB had brought the lot limitation to his attention.

Mr. Ellis asked Mr. Cunningham if the revised covenants were part of the approved plan. Mr. Cunningham replied that Cushing's ordinance did not require covenants, no such condition had been placed upon the approval and there was no notation relating to covenants on the plan. Mr. Cunningham said the PB might argue that the covenants ought to be consistent with what Mr. Tower had submitted, because the approval was based on his application. He said, however, that the covenants were largely concerned with private party issues. In conclusion, Mr. Cunningham said he did not think the PB could hold Mr. Tower to the covenants he had initially presented; that could be done in the future by making the covenants a condition of approval. He said he had also consulted with colleagues in real estate law who had said Mr. Tower had the right to add lots. Mr. Remian asked if the covenants should be referenced on the drawing and Mr. Cunningham said they should. Mr. Roberts asked how this would affect people who had bought lots: would they become upset to find that what was originally in their deeds was not the final set of covenants? Mr. Tower responded that he had researched the deeds and they all referenced the correct version of the covenants.

Mr. Ellis asked how the Resource Protection [RP] determination by Rich Baker would affect Lot #26 and the road extension. Mr. Baker had found that the slopes were in RP and Mr. Ellis felt they should be defined on the plan. Mr. Roberts asked the CEO where the areas had been identified. Mr. Bickford said they were identified on the map in his office but had not been finalized. Mr. Bickford had visited the site with Mr. Baker, who used an inclinometer to determine that the area along Lot #26 was in RP. The CEO said there was a question, which he was not qualified to answer, as to whether slopes divided by a plateau constituted "two or more contiguous acres with a 20% or more slope". Therefore, Mr. Bickford said, there was the question of how to make a final determination on the issue. Mr. Remian said the burden of proof was on the applicant and it should be proven to the PB through an independent source. Mr. Ellis agreed that the Board needed an independent analysis. Mr. Roberts asked if Mr. Baker could make the determination. The CEO said Mr. Baker had determined that Mr. Tower's subdivision contained RP areas, but he had not been site specific. Mr. Kiskila said it was not Mr. Baker's job to make a specific determination. Mr. Ellis said he thought the exact location of the RP areas should be shown on the plan; Mr. Bickford said he thought that was a requirement.

Mr. Tower read aloud from Section 13(A)(3) the definition of RP. He then said that his employees had measured this very carefully and the areas down slope from the road were RP and would be marked as such on the plan. He added that probably all of the common area was RP and below the road, within 100' of the turnaround, he agreed qualified for RP. Mr. Tower said the road was sited so the outer edge followed a plateau, creating a non-contiguous break. He concluded that there were sufficient plateaus and breaks so that the road area did not encompass two contiguous acres. Mr. Roberts said the common area looked to have the steepest slope and should be so identified on the Mylar.

Mr. Bickford suggested Subsection 8.2, (land suitable for development) of the subdivision regulations and Page 7 of Shoreland Zone (establishment of districts) might be helpful to the Board. Mr. Tower said he understood the second reference to say that a road in an RP area would be allowed to a permitted use. The CEO disagreed and Mr. Cunningham said that if the two ordinances conflicted, the stricter would apply. In addition, Mr. Cunningham said Mr. Tower should use the least impacting route for his road. Mr. Tower contended that the area in which he proposed constructing the road did not meet the criteria for RP, though areas around it might, because there were

not two contiguous acres. Mr. Cunningham summed up the discussion by saying the developer was telling the Board that, while there might be RP in the area, there was not where he was proposing to develop the road. The burden of proof was the responsibility of Mr. Tower and the PB had to decide if he had adequately proven his case. He suggested the PB consider, on Page 35 of the Shoreland Zone regulations, references to sustained slope and changes in elevation. Secondly, Mr. Cunningham noted that the Subdivision Ordinance prohibited approving development in an RP district.

Mr. Ellis said the Board did not have sufficient proof and Mr. Roberts added that a more detailed map was needed. Mr. Tower said he already had more detailed topographical data about the area in question. He offered to have a profile plan delivered to the meeting and the Board accepted. Mr. Cunningham said the Board should be sure any survey accepted as proof was signed by a surveyor and said the plan should reference that survey.

Mr. Remian asked if the November 2005 application was the most current. The Board thought it was, with the exception of the covenants. Mr. Remian went over a few points in the interest of having a complete application. He then said that Item #9 (no common area) needed to be updated. Under Item #7, Mr. Remian said the road name needed to be corrected. He stated that the letter from the Dept. of Wildlife and Fisheries was not included under Exhibit #6. Mr. Tower said that would be provided to the CEO soon. Mr. Remian said he thought the letter on financial capability (Exhibit #7) was inadequate, though he accepted that Mr. Tower had the means to complete the development. Mr. Remian noted that updated covenants needed to be included. He reminded Mr. Tower that the flood plain must be depicted on the Mylar. Mr. Ellis said that the items brought up by Mr. Remian would lead to the conclusion that the application's completeness could not yet be established. Mr. Remian agreed and said he wanted one complete package and time to review it. Mr. Tower said he would be willing to produce a new, complete and concise application.

The meeting went on to Item #2 on the agenda until, at 7:45 pm, the plan and profile of the road extension were delivered. Mr. Tower explained the drawings in detail. He said there was an inconsistency within the ordinance wherein the terms "percent grade" and "percent slope" were used interchangeably. He said "percent grade" was defined as the feet of increase in elevation divided by the 100' horizontal distance; "percent slope" was measured by the 100' of slope distance. He said slope was the standard term and the average full width of the road was less than 20% grade and the area would not meet the definition of RP related to slope. Mr. Roberts thought the map was sufficient proof and asked who had done the work. Mr. Tower said his contractor's surveyor, who was not registered, did the survey. Mr. Tower offered to have a registered surveyor do the work and the Board accepted this offer. Mr. Tower said the stamped survey with RP identified would be a separate submission. Mr. Cunningham said the RP area would need to be depicted on the plan and a note on the plan should refer to whatever plan the PB relied upon.

CEO Bickford asked what he should be anticipating from Mr. Tower. Mr. Tower said he would provide, within a couple of days, an entirely revised and updated application form, an updated site plan with notes, a stamped survey, a revision note on the plan referring to book and page and the changes requested in the hamme head point area (common area and revised covenants).

2. Robbins Mountain Subdivision, Cushing Holdings LLC, Pre-Application, presented by James Tower: Mr. Tower said this new subdivision would be located on two parcels of land, one of which he had already acquired and one that he would shortly own. He stated the subdivision would consist of thirteen lots, a one-acre common area with frontage on Maple Juice Cove, a small parking area, path, ramp and float. Prior to the sale of any lots and outside the subdivision approval, additional lands would be conveyed to Randy Robbins. Mr. Robbins' entrance onto Pleasant Point Road would be removed and he would have a driveway off the subdivision road. The subdivision road would be 2025' long. There would be a fire pond near the road and all lots would be within 2000' of it. A storm water control basin was shown on the plan to meet the new DEP regulations for quality treatment of water that flows into the ocean.

Each of the lots would have a 50' X 80' building envelope, within which all primary structures would have to be located. Each envelope would be situated to have a view of Maple Juice Cove and each lot would have a "protected view easement" across Randy Robbins' lot, Mr. Tower stated. Mrs. Kalloch asked if Lot #3 had previously been deeded to Randy Robbins. Mr. Tower said it had, but would be swapped for the area Randy wanted. Mrs. Kalloch asked if there would be tree cutting. Mr. Tower said all cutting would be done in compliance with Shoreland Zoning. He said he was asking the PB to allow construction of a parking area within 50' of the high water mark because a 75' setback would not provide room for the parking lot. Mr. Roberts asked if the eight parking spaces could be placed elsewhere. Mr. Tower said they could, if the PB insisted, but would result in a parking lot with 80' on the road. He said this would be ugly, would encourage backing onto the road and would not allow

nighttime control the way a single entrance would. Mr. Ellis asked if Mr. Tower had considered accessing this new subdivision from his other road. Mr. Tower said his agreement with the Accord Group limited him to a road within a corridor. Mr. Remian ascertained that there would be some cutting in the common area.

CEO Bickford asked if the retention pond was a DEP requirement. Mr. Tower said he would be following the DEP storm water management plan. The CEO asked where the water would go from the pond. Mr. Tower drew a cross section of the pond on the board, saying there was a rim with a soil ledge all around it. The outlet would be a perforated pipe embedded in crushed stone to filter the discharge. Down slope from the pipe would be a level-lip spreader that would disperse the water slowly so it would be retained by the slope. The CEO asked if the gallons per minute had been calculated for the outflow pipe. Mr. Tower said they had and some water would go into the existing roadside ditch. Mr. Bickford said there were no wetlands depicted and Mr. Tower said they would be on the next version of the plan. Mr. Bickford then asked how the building envelope would be enforced. Mr. Tower said the homeowner's association would control them and they would be noted on the deeds.

Mr. Roberts asked if emergency vehicles would use Mountain Road and Mr. Tower said they would. There was a brief discussion between the applicant and Kim Young regarding lines. Mr. Remian asked the purpose of the wooded buffers near the fire pond. Mr. Tower said the disposition of this retained land was undecided. Mrs. Kalloch asked about an area on the plan and Mr. Tower said it would house a maintenance garage for road equipment; the yard area would serve as a turnaround for the fire pond. Mr. Ellis asked if the subdivision road would terminate at the fire pond. Mr. Tower said it would terminate for subdivision purposes, though it might continue as a woods road.

Mr. Cunningham noted these lots were smaller than those previously developed by the applicant. He advised Mr. Tower to be conscious of the 40,000 square foot buildable area limitation, which needed to be depicted on the plan. In reference to the parking area, Mr. Cunningham said the Shoreland Zoning ordinance required parking areas meet the setback for structures, except for fisheries. He saw no provision to grant the applicant a reduction in the 75' without a variance. Mr. Tower contended that the PB could reduce the road and/or driveway setback. Mr. Roberts encouraged the applicant to move the parking area closer to the road.

A member of the public asked if this road would provide public access. Mr. Tower said it would be private, landscaped and possibly gated.

3. Old Business: None

4. New Business:

5. Adjournment: Mr. Roberts made a motion, seconded by Mr. Ellis, to adjourn at 7:55 pm.
Carried 5-0-0

Respectfully submitted,

Deborah E. Sealey
(Transcribed from the notes of Crystal Robinson and the audio recording)